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IN THE

Supreme Court of the United States

October Term, 1960.
No. 186

LUIS ESTRADA MOYA,

Petitioner,

vs.

THE PEOPLE OF THE STATE OF CALIFORNIA,

On Writ of Certiorari to the Supreme Court of the State of California.

RESPONDENT'S BRIEF.

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SUBJECT INDEX

PAGE

Introduction 1

Argument 5

I.

Was petitioner's right to the trial guaranteed by the due process clause of the XIV Amendment violated in view of the conduct of the District Attorney, the resulting publicity, and the other circumstances under which the trial was held? 5

A. The sole questions concerning newspaper articles is their effect on persons exposed to them, not whether they accurately reported the facts 6

B. The newspaper publications were not such as to cause every person who read them to become legally biased 9

1. The reported facts of the crime and of the trials of petitioner's co-defendants 9

2. The reported comments of the trial judge 12

3. The reported remarks of the District Attorney .. 15

C. Assuming that some published report would cause every reader to become legally biased, there is no proof that any juror who served read that report 19

D. Assuming that at least one juror became legally biased by what he read, there is no proof that he retained that bias at the time of trial 23

E. Two California courts held that the published reports would not make it impossible to obtain a fair jury 24

F. Petitioner at the trial did not believe that any juror was legally biased 25

G. Summary 27

PAGE

II?

Was there a violation of petitioner's right to a fair trial, as guaranteed by the due process clause of the XIV Amendment of the Constitution of the United States of America, where in a trial of a capital offense by jury, the trial court permitted to remain in the jury box and sit in judgment, three jurors who had entered the jury box with fixed opinions as to petitioner's guilt, and retained such opinions while being examined on voir dire? 34

III.

Other points raised by petitioner are not before this court.... 35

Conclusion 36

Appendices:

Appendix A. Newspaper reports of out-of-court statements purportedly made by counsel for defendants to newspaper reports .....App. p. 1

Appendix B. Newspaper comments .....App. p. 4

TABLE OF AUTHORITIES CITED

CASES	PAGE
Chapman v. People, 338 U. S. 943, 94 L. Ed. 581, 70 S. Ct. 423	22
Holt v. United States, 218 U. S. 245, 54 L. Ed. 1021, 31 S. Ct. 2	30
Irvin v. Dowd, 271 F. 2d 552, cert. granted 4 L. Ed. 2d 542	30
Marshall v. United States, 360 U. S. 310, 3 L. Ed. 2d 1250, 79 S. Ct. 1171	33
People v. Burwell, 44 Cal. 2d 16, 279 P. 2d 744	23
People v. Chapman, 93 Cal. App. 2d 365, 209 P. 2d 121	22
People v. Cook, 39 Cal. 2d 496, 247 P. 2d 567	22
People v. Darby, 114 Cal. App. 2d 412, 250 P. 2d 743	10
People v. Duncan, 53 Cal. 2d 803, 350 P. 2d 103	36
People v. Goldenson, 76 Cal. 328, 19 Pac. 161	23
People v. Hall, 220 Cal. 166, 30 P. 2d 23	23
People v. McKay, 37 Cal. 2d 792, 236 P. 2d 148	25
People v. Mendes, 35 Cal. 2d 537, 219 P. 2d 2d 1	23
People v. Moya, 53 Cal. 2d 819, 350 P. 2d 112	5, 25
People v. Suniga, 128 Cal. App. 2d 738, 275 P. 2d 914	23
People v. Yeager, 194 Cal. 452, 229 Pac. 40	23
Stroble v. California, 343 U. S. 181, 96 L. Ed. 872, 72 S. Ct. 599	26, 27
United States v. Handy, 351 U. S. 454, 100 L. Ed. 1331, 76 S. Ct. 965	14, 28

MISCELLANEOUS	
Cordnet Magazine (January, 1960, p. 136)	16

STATUTES PAGE

California Penal Code, Sec. 1033 24

California Penal Code, Sec. 1035 24

California Penal Code, Sec. 1073 26

California Penal Code, Sec. 1192.3 17

United States Constitution, Fifth Amendment 33

United States Constitution, Fourteenth Amendment 33

TEXTBOOKS

34 California State Bar Journal (1959), p. 859 18

Philips, Felix Frankfurter Reminisces (1960), p. 169 21

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RESPONDENT'S BRIEF.

Introduction.

Unlike co-petitioner Baldonado's brief, petitioner Moya's brief distorts the facts, goes beyond the record and is completely misleading.

The first three paragraphs under "Statement of Facts" leave the impression that defendants Moya, Baldonado and Duncan were arrested for murder about the middle of December, interrogated daily without benefit of counsel and not arraigned until December 30. No part of the record is cited in support of these allegations and none could be. The fact is that not one of the defendants was arrested for the murder of Olga Duncan until after they were all indicted for the crime

on December 26, 1958. It is true that they were all in custody when indicted, but on other charges. Elizabeth Duncan was under arrest for obtaining a fraudulent annulment of her daughter-in-law's marriage, a charge to which she subsequently pleaded guilty. Baldonado was under arrest for failing to provide for his children, a charge to which he had already pleaded guilty. Moya was under arrest as a parole violator and was awaiting return to the state prison (a procedure which does not involve arraignment or the benefit of counsel). Respondent has gone outside the record to state these facts in order that petitioner's outside-the-record, misleading statements will not be accepted by this Court as the truth.

In the next paragraph petitioner states that the population of Ventura County was 170,000 wheras the 1960 Federal Census shows 199, 138 which necessarily means that the population was nearly that figure one year earlier. Petitioner states there were two daily newspapers published in the county whereas there were three (the other being the Santa Paula Chronicle).

Out of the mass of newspapers now before this Court, petitioner quotes selected articles and even then omits those portions of the articles indicating the fair treatment of the subject given by the press. Respondent urges that this Court read *all* the articles in their *entirety* to get a proper perspective. Moreover, this Court should bear in mind that petitioner's counsel (at the trial and in this Court), Burt Henson, submitted

as exhibits not *all* of the newspapers carrying accounts of the case, but only selected issues. For example, while counsel now complains about courtroom photography, he did not object when pictures of him arguing a motion for change of venue were taken and published. [Exh. A-1 to Declar.; Tr. of R. p. 63.]

Petitioner points out that Exhibit A-7 contained a photograph and story about the prosecuting attorney. He neglects to point out that this was a two part feature prior to the trial of Mrs. Duncan and that the same newspaper on February 2, 1959, published a similar photograph and story about the defense attorney, S. Ward Sullivan. [Exh. A-6 to Declar.; Tr. of R. p. 65.]

Perhaps the most glaring example of the conduct of Burt Henson is the matter of petitioner's confession. A tape recording of petitioner's confession was made by the officer to whom the confession was made. The contents were not released to the public by any law enforcement personnel. But Mr. Henson, using discovery procedures available in California, obtained the tape. [Tr. of R. pp. 41-43.] Thereupon he had a copy made and turned it over to a radio station for repeated broadcasting throughout Ventura County. Newspapers described this incident. The confession—in petitioner's own voice—was a cold blooded description of how he brutally murdered Olga Duncan. Nothing reported in the newspapers could compare in effect with this inci-

dent engineered by petitioner's counsel. Petitioner himself also gave radio interviews regarding his part in the case. No menti n, of course, has been made in petitioner's brief about these facts.

Petitioner throughout his brief assumes that what the newspapers reported is what in fact occurred. Thus he cites the "assault upon co-defendant Duncan" and the "threatening letters received by co-defendant Duncan" as evidence of "public outbursts of hostility and prejudice". Although one newspaper reported an assault on Elizabeth Duncan, the report was wholly false. [Tr. of R. p. 26.] There is not one word in the record to support any claim that Mrs, Duncan received any threatening letters. Many of the other newspaper reports are not supported by the record. One report, for example, said that 1,000 persons were in the courtroom when defendants were arraigned. [Exh. 2.] The fact is that there are 99 seats in the courtroom [Tr. of R. pp. 128, 129] and there were less than 200 persons inside and outside the courtroom, standing and sitting. [Tr. of R. pp. 26, 128, 129.]

Respondent asks that the case be heard in this Court as it was in the trial court and in the Supreme Court of California—on the evidence and on the record, not on newspaper stories.

ARGUMENT.

I.

Was Petitioner's Right to the Trial Guaranteed by the Due Process Clause of the XIV Amendment Violated in View of the Conduct of the District Attorney, the Resulting Publicity, and the Other Circumstances Under Which the Trial Was Held?

Respondent understands that the sole point posed by the Court's question is whether by holding petitioner's trial before a jury in Ventura County on April 20, 1959, California deprived petitioner of a fair trial. Petitioner claims that it was impossible for him to be fairly tried before a jury at that time and place because of the newspaper publicity regarding the case.

Petitioner murdered Olga Duncan on November 17, 1958. He was brought to trial over five months later for the sole purpose of having his penalty fixed, he having theretofore pleaded guilty to first degree murder. The sole question before the jury was whether petitioner should be imprisoned for life or executed. The jury determined that he should be executed.

Petitioner, in his appeal to the California Supreme Court, alleged that numerous errors occurred during the judicial proceedings against him. That court found that except for one evidence ruling which was nonprejudicial, no errors occurred. It unanimously affirmed the judgment. (*People v. Moya*, 53 Cal. 2d 819, 350 P. 2d 112 [1960].) Respondent understands that this Court's order on granting certiorari eliminated any

question of the propriety of the trial judge's rulings during the course of the judicial proceedings. Thus the issue is confined to whether facts and circumstances outside of the judicial proceedings and prior to the trial deprived petitioner of a fair trial. There is no showing that any fact or circumstances occurred outside the judicial proceeding except the publication of the newspaper articles which were submitted as exhibits to applications for change of venue. Consequently, the narrow issue is whether the pre-trial publications prevented the selection of a fair and impartial jury.

A. The Sole Question Concerning Newspaper Articles Is Their Effect on Persons Exposed to Them, Not Whether They Accurately Reported the Facts.

Suppose a certain newspaper published a story that the judges of the county held a meeting and unanimously declared that they hoped and expected that every person called as a juror for petitioner's case would vote for the death penalty. No such meeting was held and no such statement made by any judge. Nevertheless, if the effect of reading the article was such that the reader thereafter could not fairly try petitioner, the fact that the story was wholly false would not make trial by such a person (as a juror) any less unfair.

In this connection it should be noted that the out-of-court conduct of the District Attorney is not properly in question here, nor was it in the courts below. Newspapers were attached as exhibits to petitioner's applications for change of venue in the trial court. The question before the judge was whether (assuming all prospective jurors would have read the articles) the effect of the articles on every reader would be that he

would be unable to fairly try petitioner on the issue of penalty. Where an article purported to relate a statement by the District Attorney, the judge was not concerned with whether the District Attorney actually made such a statement or with whether it was true, but with whether the effect on prospective jurors was such that they would necessarily become and remain legally biased.[1] Counsel for petitioner acknowledged this when he said in the trial court: "And it doesn't make any difference whether the publications . . . were true or not." [Tr. of R. p. 132.]

The District Attorney did not file an affidavit denying the making of those statements (among those attributed to him in the 131 newspaper exhibits) which were in fact not made by him. The reason is simple. Whether he made any or all of the statements attributed to him was not in issue. Suppose, for example, that a prospective juror read an article in the Ventura Star-Free Press of January 19, 1959, a copy of which was filed as an exhibit three months later on April 16, 1959. What possible materiality would an affidavit by the District Attorney filed in court in April have on the juror's state of mind? Would the trial judge be entitled to believe that any report prejudicial to petitioner

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[1]The words "biased" and "prejudiced" as used throughout this brief refer to a state of mind wherein a person's opinions are so fixed that he is unable to decide an issue on the basis of evidence presented to him unaffected by the previously formed opinions. In California, as in almost all jurisdictions, a person is not "biased" or "prejudiced" simply because he has heard or read about a case or because he has formed opinions about the issues if, notwithstanding his opinions, he can decide the case solely on the evidence presented in court. To distinguish between one who has an opinion which does not disqualify him as a juror and one whose opinion is "fixed" and thus disqualifying, the latter is often referred to herein as "legally biased."

was rendered inoffensive because the District Attorney said in court three months later (and not in the presence of the juror) that he made no such statement?

Moreover, the out-of-court conduct of the District Attorney can not be proved by newspaper articles attached as exhibits to an affidavit supporting a motion for change of venue. The fact that a newspaper says that the District Attorney made a certain statement is not proof that the statement was made. It is the rankest kind of hearsay. The California Supreme Court recognized this fact and carefully used such phrases as "an article quoted the district attorney as saying", as "an article quoted the district attorney at length", and as "the district attorney was reported to have made" certain statements. The court did not say, and it could not say, that the District Attorney did in fact make those statements because there was no proof that he did (except insofar as he admitted making one statement in his own affidavit). To emphasize the point that there was no proof of the out-of-court conduct of the District Attorney, the California Supreme Court noted that at oral argument "the district attorney denied making most of the statements attributed to him." The California Supreme Court, in other words, recognized, as did the trial court and counsel, that the purpose of the exhibits was to determine whether prospective jurors who might have read them would have become biased and not to determine whether what the articles said was true.

Respondent has treated this point at length because petitioner sought certiorari on the claim that the articles were proof of the facts stated therein and because this Court, in its order of June 27, 1960, seemed to

accept this view when it asked whether "the conduct of the District Attorney" violated petitioner's right to a fair trial.

B. The Newspaper Publications Were Not Such as to Cause Every Person Who Read Them to Become Legally Biased.

Since there is nothing in the record to indicate that any particular juror actually did not act fairly and impartially, any conclusion that a juror did not so act must necessarily be based on the premise that because of the newspaper publications the juror *could not* (and therefore the juror *did not*) act fairly and impartially.

For convenience in discussing this point, respondent has divided the publications into three categories which will be separately discussed.

1. *The Reported Facts of the Crime and of the Trials of Petitioner's Co-defendants.*

Olga Duncan, a pretty, young Santa Barbara nurse who was the wife of a Santa Barbara attorney, disappeared on November 17, 1958. She was pregnant and there soon began to be news stories about her disappearance. By the middle of December, interest in the case had spread beyond Santa Barbara County. Los Angeles newspapers carried stories about the matter and newspapers in Ventura County likewise did. At this time there was no indication that anything had happened in Ventura County.

Then on December 22, 1958, the newspapers reported that Augustine Baldonado, awaiting sentence in Ventura County on another charge, confessed that he, together with petitioner, murdered Olga Duncan on No-

vember 17, 1958, and buried her in Ventura County. [Exhs. 3, 10, 24, 30 to affidavit; Tr. of R. pp. 17; 19, 21.] On December 26, 1958, the newspapers reported that petitioner confessed the murder. [Exhs. 18, 26, 34 to affidavit; Tr. of R. pp. 20, 21, 22.]

After the transcript of the grand jury hearing was filed, it became a public record (*People v. Darby*, 114 Cal. App. 2d 412, 250 P. 2d 743 [1952]), and the newspapers quoted at length from the testimony including that given by petitioner as a witness.

The trial of co-defendant Elizabeth Duncan (who had hired petitioner to commit the murder) began on February 16, 1959. It was widely reported and pictures of courtroom scenes were included. Although the District Attorney had asked that the court make an order against taking pictures in the courtroom, no such order was made when defendant Duncan and her counsel expressly agreed that pictures could be taken. [Tr. of R. (Duncan case) pp. 259, 260.] The testimony of petitioner, who was a witness, was reported in the newspapers. He was quoted as admitting the murder of Olga Duncan.

Local newspapers also reported the trial of co-defendant Baldonado which began April 6, 1959, although petitioner was not a witness in that case.

When petitioner's trial began on April 20, 1959 penalty was the sole issue to be determined, petitioner having theretofore pleaded guilty to first degree murder. The first question before this Court is whether each and every person reading the articles now before this Court would necessarily be of such frame of mind that he could not fairly and impartially determine

whether petitioner should suffer the death penalty or life imprisonment.

Respondent believes that the answer to the question can be supplied only by the subjective reactions of the members of this Court after reading all of the exhibits.

If a member of this Court can read the articles without concluding that if he were to try the case, he would impose the death penalty on petitioner regardless of what the evidence might be, then petitioner's right to a fair trial was not infringed.[2] This is so for the reason that nothing in the record indicates that any of the twelve jurors had any fixed opinion from any source as to what the penalty should be and nothing indicates that any juror was less capable of deciding the case on the evidence than a member of this Court would be. On the contrary, the jurors all declared that they would decide the case solely on the evidence and petitioner accepted these declarations because he did not challenge a single juror.

Respondent submits that a reading of the exhibits would not leave every reader in the frame of mind that petitioner should be executed regardless of whatever evidence might be presented in court.

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[2]The converse is not true. If a member of this Court upon reading the newspapers feels that he would thereafter be unable to fairly try the case, it does not mean that all persons would have similar reactions. Before concluding that petitioner was deprived of a fair trial, it would be necessary to find that (1) all persons would necessarily be affected in the same manner as the Justice, (2) at least one juror read the matter deemed offensive, (3) the reaction continued to exist from the time of reading to the time of trial, (4) the juror in stating that he could try the case fairly was incorrect in his conclusion and (5) petitioner may raise the point in this Court even though at the trial he did not challenge any juror on the ground of bias.

2. The Reported Comments of the Trial Judge.

The trial judge, in denying petitioner's motion for a change of venue on January 15, 1959, said, among other things, that "[i]t is a sad commentary on the integrity, decency and humanity of the people of Ventura County to say that defendants, whose very lives may be at stake, cannot receive a fair and impartial trial in this County." [Tr. of R. p. 137.] Petitioner's counsel immediately construed the remark as indicating that the judge thought counsel was critical of the local citizenry. The judge, however, quickly disclaimed any such intent. [Tr. of R. p. 138.]

Petitioner included as an exhibit [Exh. A-2, erroneously cited as Exh. A-1 to declaration; Tr. of R. p. 63] the January 15, 1959, issue of the Ventura County Star-Free Press containing the above quoted remarks of the trial judge. He now vigorously contends that the published remarks erroneously indicated that the motion was an attack on the citizens of the county and that the citizens thereby became hostile toward him. As is the case in so many other instances of petitioner's reliance on newspaper clippings, petitioner has not told the whole story. At the request of counsel for petitioner, the judge issued the following statement to the press:

> "I want to correct any false impression which might have been created by reason of a statement made by me in an order denying a motion for a change of venue, in the case of The People of the State of California vs. Elizabeth Ann Duncan, Luis Estrada Moya and Augustine Baldonado. The statement I am referring to reads as follows:

"'It is a sad commentary on the integrity, decency and humanity of the people of Ventura County to say that defendants, whose very lives may be at stake, cannot receive a fair and impartial trial in this county.'

"By making this statement, I intended in no way whatever to suggest that Burt Henson, counsel for defendant Luis Moya, and John Danch, counsel for defendant Augustine Baldonado, were attacking the integrity, decency or humanity of the people of Ventura County. Neither counsel at any time or in any manner said or did anything to reflect upon the integrity, decency or humanity of the people of Ventura County. I believe the motions for change of venue were made by counsel acting in the utmost of good faith. It is both the legal right and duty of counsel to move for a change of venue whenever he feels such a motion is necessary in view of the circumstances surrounding that particular case. The statement set forth above is merely my way of stating that I believe the defendants shall receive a fair and impartial trial in Ventura County."

That statement was printed in the January 17, 1959, issue of the Ventura County Star-Free Press and in the January 19, 1959, issue of the Oxnard Press Courier. Significantly, however, petitioner chose not to include as exhibits either of these issues.

Notwithstanding petitioner's failure to disclose the whole picture, respondent submits that no person reading the published report of the judge's comment on January 15, 1959 (and not the later explanation),

would react in such a way that he could not, more than three months later, fairly decide whether petitioner's penalty should be life imprisonment or death.

At the conclusion of co-defendant Baldonado's trial, the trial judge said:

> "All right, ladies and gentlemen of the jury, I have been observing you throughout the week and I have concluded that you are a very, very thoughtful, conscientious jury. You had a very hard task to perform and you showed the proper amount of courage and I congratulate you. The people of Ventura County and of the State of California are very thankful for your services. Your checks for mileage and per diem will be mailed to you. You are now discharged." [Rep. Tr. (Baldonado case) p. 467, lines 10-17.]

The Oxnard Press Courier of April 9, 1959, reported these comments as follows [Exh. A-89 to declaration; Tr. of R. p. 69]:

> "The jury was polled and Judge Blackstock said, 'The jury is unanimous as it has to be.' He complimented the jurors as thoughtful and conscientious and said they 'showed the proper amount of courage and I'm proud of you.' "

The contention that this publication dictated a death penalty for petitioner has already been answered by this Court. In *United States v. Handy,* 351 U. S. 454, 100 L. Ed. 1331, 76 S. Ct. 965 (1956), a death verdict on co-defendants Foster and Zeitz was returned on June 4, three days before the trial of petitioner for the same offense. The trial judge was quoted in the

newspapers as telling the Foster-Zeitz jurors (pp. 907-968):

> "'I don't see how you could, under the evidence, have reached any other verdict. Your verdict may have a very wholesome effect on other young men in all vicinities who may come to realize the seriousness of the folly in which so many young men indulge in these days. The only hope of stemming the tide of such crime by youth is to enforce the law which you have indicated by your decision.'"

Petitioner's trial resulted in the imposition of the death penalty. This Court said (p. 971):

> "Nor do we conclude that petitioner was prevented from obtaining a fair jury trial by reason of Judge Boyer's commendatory remarks to the Foster-Zeitz trial jury, reported in the local press two days before petitioner's trial. At most, petitioner has shown that this created a possible opportunity for prejudice."

3. *The Reported Remarks of the District Attorney.*

The District Attorney is quoted in the Ventura County Star-Free Press of December 22, 1958, and the Oxnard Press Courier of December 24, 1958, as being in favor of the retention of the death penalty in California. Petitioner claims that the article was a demand by the District Attorney that petitioner be executed and that the story necessarily would influence every reader against petitioner.

In the first place, the statement on its face shows that it was concerned with contemplated legislation, not with the trial of petitioner's case. That the reporter

of the Ventura County Star-Free Press considered it as such is illustrated by the opening sentence of the story: "District Attorney Roy Gustafson saw the Duncan murder as reason for a continuation of California's death penalty." The headline writer saw it in the same light because the headline reads: "D. A. Urges Death Term in Killings." There was only *one* killing involved in the instant case. The plural word "Killings" clearly indicates that the statement related to the retention of capital punishment for murders in general and not for this particular murder alone. There was nothing unusual in the District Attorney's public statement on this subject because he had often been quoted in his appearances before the California Legislature in opposition to the repeal of capital punishment. In fact, Coronet magazine (Jan., 1960, p. 136) described him as "one of the nation's most outspoken advocates of capital punishment."

In the second place, when this statement was published petitioner was not under arrest for, nor charged with, the murder. His name was not mentioned in the statement. It was yet to be determined who would be charged with being the perpetrators of the murder much less who, if anyone, would ultimately be convicted thereof.

Certain it is that not every person who read the statement of the District Attorney was persuaded to his point of view regarding capital punishment. The only reactions received by the newspaper to the published statement were protests against it as evidenced by published letters to the editor on December 24, 1958, December 30, 1958, and January 3, 1959. [Exh. A to affidavit; Tr. of R. 32.] Moreover, 24 out of the

70 prospective jurors examined were excused on challenges for cause because of their conscientious scrupples against the death penalty. Again, it is obvious that if the 24 persons read the statement of the District Attorney, they were not in the least persuaded by it.

An article of December 30, 1958, in the Ventura County Star-Free Press set forth what purported to be the District Attorney's reasons why he would seek the death penalty as to petitioner and his co-defendants. (The fact that the article was not true is indicated by the issue of the same newspaper on February 24, 1959 [Exh. A-14 to declaration; Tr. of R. p. 66], reporting that the District Attorney had not even then stated whether he would seek the death penalty for the co-defendant then being tried.) However, respondent acknowledges that the truth or falsity of the publication is not in issue. The question is whether those who read the article would become so biased that they could not fairly try the petitioner.

The answer seems evident. In any capital case every prospective juror necessarily knows before the trial commences whether the prosecuting attorney will seek the death penalty. This is apparent from the examination of the jurors as to their views with respect to capital punishment. In petitioner's case, where the only issue was punishment, there would have been no trial at all if the District Attorney had not been seeking a death verdict because under California law the punishment would be life imprisonment if the District Attorney agreed to it. (Cal. Penal Code, §1192.3.)

Petitioner seeks to leave the impression that purported comments from the District Attorney of Ventura County were more damaging than they otherwise

would have been because Ventura County is a small, rural area (and presumably everyone knew the prosecutor). This Court can take judicial notice of the 1960 preliminary census figures. They show that of the more than 3,100 counties in the United States, Ventura County ranks in the upper 5% in population. Moreover, of the 38 prospective jurors asked by petitioner's counsel as to whether they knew the District Attorney, only two replied in the affirmative. [Tr. of R. pp. 316, 333.]

Petitioner erroneously assumes not only that the District Attorney actually made the out-of-court statements attributed to him but also that it is misconduct for an attorney to make an out-of-court statement. The fact is that in California there is no rule of professional conduct prohibiting attorneys from making out-of-court statements. (See 34 California State Bar Journal 859 [1959] for a proposal that there be such a rule in California.)

Whether attorneys for the defendants in the three cases actually made out-of-court statements about the cases to newspaper reporters is unknown to respondent. However, the newspaper exhibits before this Court contain no less than 69 reports of out-of-court statements purportedly made by counsel for defendants to newspaper reporters. (See Appendix A.) Typical of the comments reported are those set out in Appendix B.

Even if, contrary to the facts and the California law, this Court concluded (1) that out-of-court statements were made by attorneys on both sides and (2) that the attorneys were guilty of misconduct in making the statements, it must be remembered that the proceedings in this Court are not for the purpose of disci-

plining attorneys by reversal of the judgments of the Supreme Court of California or by any other means. The sole question here is whether petitioner's conviction was had under circumstances depriving him of a fair trial.

It would unduly extend this brief if each of the articles purporting to quote the District Attorney was discussed in detail. Again respondent urges each member of this Court to read the articles and see whether he can conscientiously say that he would thereafter be unable to give petitioner a fair trial.

C. Assuming That Some Published Report Would Cause Every Reader to Become Legally Biased, There Is No Proof That Any Juror Who Served Read That Report.

Obviously nothing that occurred outside of the judicial proceedings and prior to the trial could possibly have affected petitioner's right to an impartial jury unless the event which occurred prevented at least one of the twelve jurors who served from trying the issue fairly and impartially. Petitioner claims that published reports did so. Even assuming that one or more of the publications would have caused every reader to become legally biased, petitioner has not shown that any juror read those particular reports.

Every juror had heard or read something about the case. Exactly what was heard or read was not disclosed. Petitioner's exhibits consisted of certain issues of the daily newspapers of Oxnard, Ventura and Santa Barbara and four daily newspapers of Los Angeles. No juror read all issues of all those papers. No juror was shown to have read every issue of even one of those newspapers. It could well be that no juror read

any of the issues which are exhibits. Petitioner did not attempt to ascertain exactly what any juror read.

Petitioner saw fit to select as exhibits to his application for change of venue only certain issues of certain newspapers. He made no claim that other issues did not contain reports of the case. (In the light of the purpose of the exhibits, it is obvious that petitioner did not include those issues which would show that the newspaper publicity was not such as to interfere with a fair trial.) What any juror read about the case might well, so far as the record is concerned, be entirely in newspapers not tendered as exhibits by petitioner.

Between the date of the first newspaper exhibit (December 15, 1958) and petitioner's trial (April 20, 1959) there were 127 days. Yet petitioner saw fit to include as exhibits only the following numbers of issues of these respective papers:

Ventura Star-Free Press	56
Santa Barbara News Press	22
Oxnard Press Courier	16
Los Angeles Examiner	14
Los Angeles Times	9
Los Angeles Herald Express	5
Los Angeles Mirror—News	1

Each juror was asked what newspaper he read. No one had read the Santa Barbara News Press, the Los Angeles Examiner, the Los Angeles Herald Express or the Los Angeles Mirror—News.

Juror Hanson had "read about this case in the newspapers" [Tr. of R. p. 213], but she was not asked what she read or in what newspaper she read it. Jurors

Hart [Tr. of R. p. 340], Dominy [Tr. of R. p. 319] and DeMarco [Tr. of R. pp. 343, 344] read something about the case in the Los Angeles Times. What they read was not disclosed. Jurors Comstock [Tr. of R. p. 275] and Bailey [Tr. of R. p. 334] read the Oxnard Press Courier, but what they read was not disclosed. The other six jurors read about "the Olga Duncan murder" in the Ventura Star-Free Press. Finnerty [Tr. of R. p. 277]; Wichman [Tr. of R. p. 228]; Caldwell [Tr. of R. p. 310]; Miller [Tr. of R. p. 255]; Hernvall [Tr. of R. p. 261]; Ball [Tr. of R. p. 337]. What they read was not disclosed.

Only two jurors had read any published report of anything the District Attorney allegedly said. Juror Ball said, "I believe I recall [reading] something about" what penalty the District Attorney would ask for. [Tr. of R. p. 337.] Juror Wichman "may have" read something to that effect, but said "I'm not positive." [Tr. of R. pp. 229, 231.]

As to the published report of the trial judge's remarks to co-defendant Baldonado's jury, only Juror Bailey was asked whether he read it and he said he hadn't. [Tr. of R. p. 334.] It is a well known fact that most persons read newspapers only sketchily. Mr. Justice Frankfurter is quoted as saying: "Very few people ever read anything except the headlines." (Phillips, Felix Frankfurter Reminisces, p. 169 [1960].) Public opinion polls constantly show that most persons cannot identify events which are currently the subject of intensive news coverage. Assuming that some particular report is deemed by this Court to be so damaging that anyone who read it would necessarily thereafter be unable to be fair to petitioner, the record is

barren of any showing that any juror definitely read the report.

The law in that situation is clear. In *People v. Chapman*, 93 Cal. App. 2d 365, 372, 209 P. 2d 121, 124 (1949), defendant claimed that a pre-trial newspaper article was so damaging that he could not be fairly tried in Alameda County. The appellate court rejected his claim with the observation that "There is no evidence that any newspaper reports were read by any member of the jury. . . ." This Court denied certiorari. (*Chapman v. People*, 338 U. S. 943, 94 L. Ed. 581, 70 S. Ct. 423 (1950). In *People v. Cook*, 39 Cal. 2d 496, 499, 247 P. 2d 567, 568 (1952), defendant claimed "that prior to the trial the district attorney aroused the prejudice of the people against him by making speeches about the case over the radio and at various civic meetings." Defendant's claim of lack of fair trial was rejected by the Supreme Court of California with the observation that "there is no evidence that any of the jurors who tried the case heard the speeches which were assertedly made."

If this Court believes that some particular article or articles would necessarily cause a reader to become legally biased against petitioner, respondent is at a loss to know how this Court can find that any juror read the offensive matter. The burden is on the petitioner to show that some juror did, not on respondent to show that no juror did.

D. Assuming That at Least One Juror Became Legally Biased by What He Read, There Is No Proof That He Retained That Bias at the Time of Trial.

Suppose, for example, that this Court finds that the article quoting the District Attorney's views on the desirability of retaining the death penalty was so inflammatory that ever reader would necessarily be influenced, consciously or unconsciously, to want to impose the death penalty on petitioner. Suppose further that this Court finds that juror Wichman definitely read the article. The question then is whether (assuming he became biased) he retained that bias to the time of trial.

The article was published December 30, 1958. [Exh. 8 to affidavit; Tr. of R. p. 18.] Petitioner's trial began April 20, 1959—a full third of a year after the publication. California recognizes that the fact that a whole community is aroused against a defendant by newspaper publications some time prior to trial is no proof that a fair and impartial jury cannot be obtained from that community at a later date. (*People v. Yeager*, 194 Cal. 452, 229 Pac. 40 [1924], [offensive publication 17 days before trial]; *People v. Hall*, 220 Cal. 166, 30 P. 2d 23 [1934], [18 days]; *People v. Goldenson*, 76 Cal. 328, 19 Pac. 161 [1888], [three weeks]; *People v. Suniga*, 128 Cal. App. 2d 738, 275 P. 2d 914 [1954] [three weeks]; *People v. Mendes*, 35 Cal. 2d 537, 219 P. 2d 1 [1950], [three months]; *People v. Burwell*, 44 Cal. 2d 16, 279 P. 2d 744 [1955], [four

E. Two California Courts Held That the Rublished Reports Would Not Make It Impossible to Obtain a Fair Jury.

Under California law the trial judge is required to grant a motion for change of venue "if a fair and impartial trial cannot be had in the county" where the case is pending. (Cal. Penal Code, §§1033, 1035.) Petitioner made two such motions—one on January 13, 1959, and one on April 16, 1959—supported by the newspaper exhibits now before this Court. Both motions were denied. [Tr. of R. pp. 34, 72.] The trial judge said [Tr. of R. p. 137]:

> ". . . [A]fter carefully analyzing all of the material [the newspapers] submitted to me and after diligently and thoughtfully considering the entire case as far as it has developed up to the present time, I am unable to agree with counsel for defendants in their contention that the defendants cannot receive a fair and impartial trial in Ventura County.
>
> ". . .
>
> "If I had the slightest doubt in the world about the ability of the defendants to receive a fair trial in Ventura County I would without the slightest hestiation grant the motions for a change of venue."

The trial judge thus did not believe that persons who read the newspapers and who thereafter might be called as jurors would be unable to give petitioner a fair trial. The Supreme Court of California was asked by petitioner to rule that the trial judge was wrong in this conclusion. Instead, that court affirmed

the rulings of the trial judge denying the motions for change of venue. (*People v. Moya*, 53 Cal. 2d 819, 350 P. 2d 112 [1960].)

The California Supreme Court is well aware of the requirement that trial be had before impartial jurors. In *People v. McKay*, 37 Cal. 2d 792, 236 P. 2d 145 (1951), the trial judge denied a motion for change of venue. Defendants' convictions by a jury were reversed by the Supreme Court for failure of the trial judge to order a change of venue. The court said:

> "However conscientious the members of the jury might have been, it cannot reasonably be concluded that they could so divorce themselves from their past experiences and present surroundings that a fair and impartial trial could be had."

Eight California judges (the trial judge and seven justices of the Supreme Court) examined the newspapers now before this Court and not one found that the newspaper articles were such as to prevent prospective jurors from being fair. These views should be entitled to great weight in this Court.

F. Petitioner at the Trial Did Not Believe That Any Juror Was Legally Biased.

Seventy prospective jurors were examined in petitioner's case. This is not a large number for a capital case. Only 18 of those had formed opinions on the matter in issue, that is, what penalty should be applied for the murder to which petitioner had pleaded guilty. Nine of these said their opinions were fixed and they were all excused on challenges for cause by petitioner! The other nine prospective jurors said their opinions were not fixed and they could fairly and impartially

try the case. Nevertheless, *most* of these nine were excused on peremptory challenges by petitioner.

A ground of challenge to a juror is "the existence of a state of mind on the part of the juror in reference to the case, or to either of the parties, which will prevent him from acting with entire impartiality and without prejudice to the substantial rights of either party." (Cal. Penal Code, §1073.) Petitioner was well aware of this ground because he invoked it nine times. Every time he invoked it, his challenge was allowed. Not one person who ultimately was selected as a juror was challenged by petitioner for that or any other reason. Certainly this is extremely strong evidence of petitioner's then belief that neither the newspaper articles nor anything else resulted in bias, partiality or prejudice in any juror who served.

A second indication of petitioner's attitude is his failure to move for a change of venue after the jury was selected. The trial judge expressly left that action open to him. [Tr. of R. pp. 72, 191.] If petitioner thought he could not get a fair trial because the jurors selected were biased, he would have then renewed his motion. That he did not is strong evidence of the fact that there is no basis for his present charge that the jurors were biased. (*Stroble v. California*, 343 U. S. 181, 96 L. Ed. 872, 72 S. Ct. 599 [1952].)

Finally, when petitioner moved for a new trial he did not claim as one of the grounds that he had been deprived of a fair trial by reason of the bias of the jurors due to newspaper publicity. [Tr. of R. pp. 175-184.]

G. Summary.

In *Stroble v. California,* 343 U. S. 181, 96 L. Ed. 872, 72 S. Ct. 599 (1952), this Court was considering a California murder conviction which was preceded by intense newspaper publicity. Petitioner there had been described in the newspapers as a "werewolf," a "fiend" and a "sex-mad killer". His confession had been released by the District Attorney who also announced to the press his belief that petitioner was guilty. In finding that petitioner was not deprived of a fair trial, this Court said (p. 606):

> ". . . Indeed, at no stage of the proceedings has petitioner offered so much as an affidavit to prove that any juror was in fact prejudiced by newspaper stories. He asks this Court simply to read those stories and then to declare, over the contrary finding of two state courts, that they necessarily deprived him of due process. That we cannot do, at least where, as here, the inflammatory newspaper accounts appeared approximately six weeks before the beginning of petitioner's trial, and there is no affirmative showing that any community prejudice ever existed or in any way affected the deliberation of the jury."

In the case at bar there is no affidavit that any juror was in fact prejudiced. The newspaper accounts of which petitioner complains were published almost four months before the beginning of petitioner's trial. No hostile acts or other facts were shown which indicated any community, as opposed to individual, prejudice. Neither the victim nor petitioner was a resident of the county of trial. Petitioner points to no statement of fact in any newspaper story which was not

borne out by the evidence introduced at his trial. The publication of petitioner's confessions, taken from the public records of the testimony before the grand jury, could in no event have harmed petitioner since he publicly, in open court before the trial, pleaded guilty to the crime.

In *United States v. Handy*, 351 U. S. 454, 100 L. Ed. 1331, 76 S. Ct. 965 (1956), petitioner claimed he had been deprived of a fair trial by newspaper publicity. This Court said (p. 970):

> "[P]etitioner asks this Court, in effect, to infer that the news coverage of the robbery and proceedings prior to petitioner's trial, including the Foster-Zeitz trial, created such an atmosphere of prejudice and hysteria that it was impossible to draw a fair and impartial jury from the community or to hold a fair trial. . . . [W]e are asked to read the news reports and the testimony as to other incidents and to find, contrary to the Supreme Court of Pennsylvania and two federal courts, that these reports and incidents did create such an atmosphere that it infected the jurors and deprived petitioner of a fair trial on the evidence presented to them. We see no justification in the record to warrant our so finding."

In the case at bar, all of the newspaper articles were presented to the trial judge *before* the trial and he decided that they would not necessarily prevent the selection of fair and impartial jurors. The record affirmatively shows that all of the twelve jurors finally selected said they could and would be fair and impartial notwithstanding what they read and that petitioner be-

lieved them because he did not challenge a single one for cause nor did he thereafter move for a change of venue. The Supreme Court of California held that the newspaper accounts were not such as to have required the trial judge to grant petitioner's motions for change of venue.

In order to reverse the judgment, this Court would have to do the following things:

1. Find that one or more of the newspaper articles were so inflammatory that every reader would be prejudiced against petitioner.

2. Find that at least one juror read the particular articles deemed to be offensive.

3. Find that the prejudice thereby engendered in that juror continued from the date of reading to the date of trial.

4. Find that the juror falsely stated under oath that he could and would give petitioner a fair trial.

5. Find that petitioner's failure to challenge any juror (for cause or otherwise) or to move for a change of venue after the selection of the jury is of no significance.

Respondent submits that there is nothing in the record which would support such findings.

Respondent does not claim that the publicity did not result in some prospective jurors becoming biased. It obviously did because nine prospective jurors admitted that they had fixed opinions. But respondent does claim that from the fact that some persons become biased, it does not follow that all others must neces-

sarily be likewise biased. Not all persons are persuaded to identical conclusions by the same article or the same speech.

The newspaper publicity in the case ar bar admittedly gave rise to the opportunity for some prospective jurors to reach fixed opinions as to what penalty petitioner should suffer. But as Mr. Justice Holmes, writing for this Court, stated in *Holt v. United States,* 218 U. S. 245, 251 54 L. Ed. 1021, 1029; 31 S. Ct. 2 (1910), "If the mere opportunity for prejudice or corruption is to raise a presumption that they exist, it will be hard to maintain jury trial under the conditions of the present day."

What was recently said in *Irvin v. Dowd,* 271 F. 2d 552, 554-555 (C. A. 7th Cir., 1959), certiorari granted 4 L. Ed. 2d 542 (1960), is appropriate (p. 554):

> ". . . It is not surprising that, the more extensive the news coverage of crime and the more wanton and unjustified the crime itself, the greater and more extensive is the indignation of citizens. Such indignation, varying in its degree according to the violence of the crime, and geographically extensive with the area of news distribution, undoubtedly causes many people to form impressions or beliefs as to the guilt or innocence of suspected or indicted persons. In these days of widely effective and thorough news distributing instrumentalities, such as the telephone, newspaper, radio and television, as well as rapid travel of persons by automobiles, trains and airplanes, hardly a person anywhere in a state, or in fact in the United

States, is long ignorant of the details of crimes committed in any state (or in this country), unless he be completely mentally incompetent or is in solitary confinement in a jail. In fact, it may well be that into the latter place the grapevine reaches. We no longer live in a day when what happened in the next county was learned only by conversation with a traveling man or a brakeman on the way freight train. It is into this modern society with facilities for quick and broad news coverage that a person who commits six murders projects himself. When apprehended, he is entitled to a fair trial and is to be accorded due process of law, according to the existing circumstances.

"Our problem in its last analysis is whether the general resentment of a people following the publication by news distributing media of information in regard to a series of murders may be relied upon to prevent the state from prosecuting a person indicted for these crimes, even though his trial be held before an unbiased judge and a jury is selected in accordance with established principles applicable to such a case. If the state is so prevented from trying such a person, it means that the commission within a state of a multiplicity of criminal acts, followed by the usual publicity, actually immunizes the offender from prosecution. We reject such a conclusion as the law of this circuit."

It is of particular significance that in the present case nothing appeared in the newspapers that was not

brought out during the trial. If the newspapers had published some particularly damaging facts about petitioner which either were not, or could not have been, introduced as evidence at the trial, the possibility of prejudice would have been increased. But here this Court must determine whether petitioner was deprived of a fair trial by pre-trial newspaper accounts of facts all of which (together with many more) the jurors ultimately heard from witnesses.

If such accounts are held to deprive an accused of a fair trial, then a long step in the indirect censorship of the press will have been taken. Public officers will conceal all information from the press (even though experience demonstrates that many crimes are solved and many wanted criminals are located through news items) for fear that publication of the information would jeopardize the ultimate trial of the accused. California will be forced to change its laws so that transcripts of preliminary examinations and grand jury hearings, which are now public records, will be made secret. (Even so, enterprising newspapers could nevertheless jeopardize a trial by printing information about a crime obtained from lay witnesses and other non-public sources.) Except for holding the newspaper in contempt of court, this Court will have for all practical purposes effectively forbidden the publication of facts about the most interesting, significant and important criminal cases in this country. (Obviously, the minor, routine, unimportant cases get little or no publicity.)

It is no answer to say that where newspapers have given intensive publicity to a case, the trial should be delayed or moved to a different county. If the case is

of widespread interest, the same publicity can be expected even though the trial takes place at a different time or place from that originally scheduled. Neither is it any answer to say that if the trial takes place as scheduled, a new trial should be granted. Again, it is naive to believe that similar publicity would not accompany the new trial.

When, as here, there is no editorializing, no demands for a particular result, no slanting of the news, no untrue statements, no publication of inadmissible facts and when, as here, the publicity does not result in any threat of violence, display of emotions or other conduct indicating an inflamed community, then the mere extensive news coverage should not be held to have deprived a defendant of a fair trial.

Finally, one important distinction should be noted between the case at bar and cases arising from federal trial courts. In *Marshall v. United States,* 360 U. S. 310, 3 L. Ed. 2d 1250, 79 S. Ct. 1171 (1959), newspaper articles read by jurors during the trial were held to be so prejudicial that a new trial was granted by this Court. However, this Court acted in the exercise of its "supervisory power to formulate and apply proper standards for enforcement of the criminal law in the federal courts". It did not invoke the Due Process Clause (of the V amendment). While this Court undoubtedly would invoke the Due Process Clause (of the XIV amendment) to reverse a state conviction if pre-trial publicity deprived a defendant of a fair trial, it has never done so. Respondent submits that there is less basis for doing so in the instant case than in other cases which have been before this Court.

II.

Was There a Violation of Petitioner's Right to a Fair Trial, as Guaranteed by the Due Process Clause of the XIV Amendment of the Constitution of the United States of America, Where in a Trial of a Capital Offense by Jury, the Trial Court Permitted to Remain in the Jury Box and Sit in Judgment, Three Jurors Who Had Entered the Jury Box With Fixed Opinions as to Petitioner's Guilt, and Retained Such Opinions While Being Examined on Voir Dire?

The most truthful statement in petitioner's brief is that this "question certified for review does not involve this petitioner". Nevertheless, petitioner attempts to dilute this admission by unfounded statements such as that "the jury, as constituted, was composed of six regular jurors with opinions as to what penalty should be imposed upon petitioner" and that "five of the twelve regular jurors had formed an opinion as to what penalty should be imposed upon petitioner based on reports of public news media."

The facts are that (1) every prospective juror challenged for bias or for any other cause by petitioner was excused; (2) every prospective juror challenged peremptorily by petitioner was excused; (3) when the twelve jurors were sworn, petitioner failed to move for a change of venue on the ground of bias of the jurors or on any other ground; (4) in moving for a new trial, petitioner did not claim that a single juror was biased or otherwise disqualified.

In the light of the record and petitioner's concession, there is no need for respondent to waste this Court's time by laboring the point.

III.
Other Points Raised by Petitioner Are Not Before This Court.

Petitioner devotes an entire section of his brief to the argument that the trial judge erred in (1) denying motions for change of venue and (2) in other pertinent matters.

Respondent understands that this Court deliberately limited certiorari to the question of whether petitioner was deprived of a fair trial because of the pre-trial publicity. If he was, the judgment should be reversed regardless of whether petitioner moved for a change of venue. If he was not, the judgment should be affirmed regardless of whether petitioner moved for a change of venue. The only importance of petitioner's moving, or failing to move, for a change of venue is petitioner's *then belief* of the fairness of the jury.

Before any jury panel appeared in court, petitioner unsuccessfully moved for change of venue. The denial of his motions was entirely proper (and so held by the California Supreme Court) because the trial judge reasonably believed that he should not declare that an impartial jury could not be obtained until he had unsuccessfully tried to obtain one. When the jury in this case was obtained, petitioner acknowledged that the jury was impartial because he did not then move for a change of venue—a course which had expressly been left open to him.

As to the trial judge's errors "in other pertinent matters", petitioner says that these "were cited as error . . . by way of petition for writ of certiorari." In his

petition for certiorari, petitioner threw in "everything but the kitchen sink". Despite having been limited to one question by this Court, petitioner insists on seeking to evade this limitation by again bringing up the entire record. Respondent chooses not to answer these matters in the firm belief that this Court meant what it said when it limited certiorari.

Conclusion.

The facts concerning the murder of Olga Duncan were most unusual. It was therefore only natural that the case attracted world-wide attention through news media. Petitioner admitted his guilt of first degree murder and he has at no time questioned the sufficiency of the evidence to support the verdict decreeing that his penalty should be death.

This Court now asks whether petitioner was deprived of a fair trial. He obviously was not unless the publicity was such that one or more jurors had a *fixed* opinion on the issue of penalty before the case was heard. The California Supreme Court put the matter succinctly: "Even if it be assumed that many persons formed opinions unfavorable to defendant as a result of what was published, it does not follow that persons without such views could not be found to act as jurors or that those who had adverse opinions would be unable to set them aside and try the case fairly on the basis of the evidence to be produced in court." (*People v. Duncan*, 53 Cal. 2d 803, 812, 350 P. 2d 103, 108 (1960).)

After examination of the jurors it was clear that there were nine who had formed no opinions whatever

and that there were three who would be able to set aside whatever opinions they had and decide the case solely on the evidence. Petitioner did not challenge a single one of the twelve jurors. He did not move for a change of venue after the twelve jurors were selected and before they were sworn. He did not at any time in the proceedings in the state courts claim that any one of the twelve jurors who actually tried the case was not fair and impartial.

Petitioner's motions for a change of venue, made *before* the twelve jurors were selected, can only be interpreted as a claim that all persons called as jurors who might say that they had no opinions actually would have fixed opinions adverse to petitioner and as a claim that all persons called as jurors who might say that they could and would set aside their opinions actually could not or would not be able to do so. These claims, made before any jurors were examined, that it would be impossible to find twelve impartial jurors were rejected by the trial judge when he denied petitioner's motions. They were rejected by the Supreme Court of California when it upheld the trial judge's rulings.

Respondent respectfully submits that there is nothing in the record which warrants this Court finding that the jurors who served were not fair and impartial despite their statements that they would be and despite petitioner's failure to challenge any one of them or to move for a change of venue after they had been examined. Nor is there anything in the record to warrant this Court finding that the trial judge and the Supreme Court of California were wrong in believing that

petitioner did not demonstrate, prior to the examination of the jurors, that it would be impossible to find in Ventura County twelve persons who could and would fairly and impartially try the case as jurors.

Respectfully submitted,

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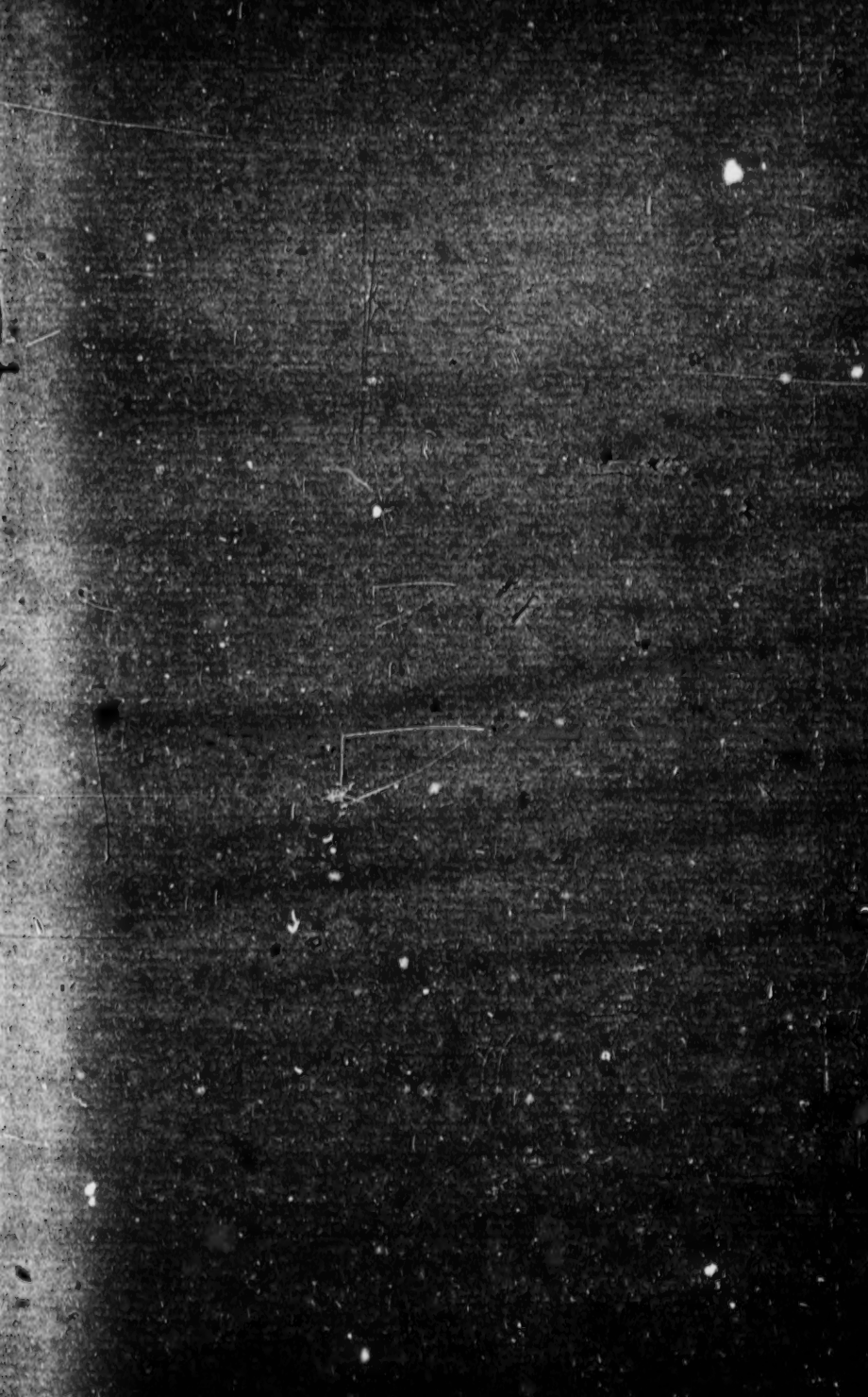

APPENDIX A.

Attorneys defending the three charged with the murder of Olga Duncan were: for Baldonado, John Danch; for Moya, Burt Henson; for Duncan, S. Ward Sullivan and Frank Duncan (the latter being formally made attorney of record on March 24, 1959). All are attorneys of record on this appeal.

For the convenience of this Court, the publications in this record in which it is reported that statements pertaining to the case were made out of court by attorneys for the defendants are here tabulated:

Date	Newspaper	Page	Exhibit	Attorney Quoted
12-22-1958	Ventura Star-Free Press	A-1	3	Sullivan
22	Los Angeles Times	25	30	Sullivan
22	Los Angeles Herald Express	A-4	10	Sullivan
23	Ventura Star-Free Press	A-1	16	Sullivan
23	Oxnard Press Courier	A-1	25	Sullivan
23	Los Angeles Times	1	31	Sullivan
24	Ventura Star-Free Press	A-1	17	Sullivan
24	Oxnard Press Courier	A-3	4	Sullivan
26	Oxnard Press Courier	A-1	26	Duncan
27	Ventura Star-Free Press	A-1	5	Duncan
27	Oxnard Press Courier	A-1	6	Duncan
27	Los Angeles Times	4	7	Duncan
29	Ventura Star-Free Press	A-1	9	Sullivan
29	Ventura Star-Free Press	A-1	9	Duncan
30	Ventura Star-Free Press	A-1	8	Sullivan
31	Ventura Star-Free Press	A-1	19	Danch
1- 7-1959	Los Angeles Examiner	1	2	Sullivan
12	Ventura Star-Free Press	A-1	S-A p. 1	Duncan

Date	Newspaper	Page	Exhibit	Attorney Quoted
12	Ventura Star-Free Press	A-1, A-4	S-A p. 1	Sullivan
12	Ventura Star-Free Press	A-1	S-A p. 1	Henson
12	Ventura Star-Free Press	A-1	S-A p. 1	Danch
13	Ventura Star-Free Press	A-1	A-1	Sullivan
20	Ventura Star-Free Press	A-1	A-3	Henson
29	Oxnard Press Courier	A-1	S-A p. 1	Henson
29	Oxnard Press Courier	A-1	S-A p. 1	Danch
29	Ventura Star-Free Press	A-1	A-4	Sullivan
29	Ventura Star-Free Press	A-1	A-4	Henson
29	Ventura Star-Free Press	A-1	A-4	Danch
2– 2–1959	Ventura Star-Free Press	B-1	A-6	Sullivan
12	Oxnard Press Courier	A-1	S-A p. 8	Sullivan
12	Oxnard Press Courier	A-1	S-A p. 8	Danch
14	Ventura Star-Free Press	A-1	A-7	Sullivan
16	Ventura Star-Free Press	A-2	A-9	Danch
16	Santa Barbara News Press	A-1	A-63	Duncan
17	Ventura Star-Free Press	A-4	A-11	Sullivan
17	Ventura Star-Free Press	A-1	A-11	Duncan
18	Ventura Star-Free Press	A-1, A-3	A-40	Sullivan
19	Ventura Star-Free Press	B-8	A-12	Sullivan
20	Ventura Star-Free Press	A-1	A-13	Sullivan
21	Ventura Star-Free Press	A-1	A-41	Sullivan
24	Ventura Star-Free Press	B-1	A-14	Sullivan
26	Ventura Star-Free Press	A-16	A-16	Duncan
26	Ventura Star-Free Press	A-1	A-16	Sullivan
26	Santa Barbara News Press	A-1	A-19	Duncan

Date	Newspaper	Page	Exhibit	Attorney Quoted
26	Los Angeles Times	32	A-84	Sullivan
27	Ventura Star-Free Press	A-1	A-43	Duncan
27	Ventura Star-Free Press	A-1	A-43	Sullivan
27	Los Angeles Examiner	1	A-62	Danch
27	Los Angeles Examiner	1	A-62	Duncan
3- 2–1959	Santa Barbara News Press	A-7	A-69	Sullivan
3	Ventura Star-Free Press	A-1	A-46	Sullivan
4	Ventura Star-Free Press	A-1	A-23	Sullivan
6	Santa Barbara News Press	A-8	A-20	Duncan
9	Ventura Star-Free Press	A-1	A-49	Sullivan
9	Oxnard Press Courier	A-1	A-86	Sullivan
9	Santa Barbara News Press	A-1	A-72	Sullivan
11	Los Angeles Examiner	1	A-32	Sullivan
16	Santa Barbara News Press	A-1	A-76	Sullivan
17	Ventura Star-Free Press	A-1, A-7	A-37	Duncan
17	Ventura Star-Free Press	A-1	A-37	Sullivan
21	Ventura Star-Free Press	A-1	A-36	Duncan
21	Ventura Star-Free Press	A-1	A-36	Sullivan
21	Oxnard Press Courier	A-1	A-35	Duncan
21	Oxnard Press Courier	A-1	A-35	Sullivan
21	Santa Barbara News Press	A-6	A-80	Duncan
21	Santa Barbara News Press	A-6	A-80	Sullivan
21	Los Angeles Examiner	1	A-34	Duncan
21	Los Angeles Examiner	16	A-34	Sullivan
24	Ventura Star-Free Press	A-1	A-59	Sullivan

APPENDIX B.

The nature of the reported statements by defense attorneys to newspapers is illustrated by the following excerpts:

"Frank later rapped what he called the political ambitions of the district attorney. 'There was no question that there was political ambition in this,' he said. 'He intends to climb to some higher position over my mother's body.' "

(p. A-1 Ventura Star-Free Press March 21, 1959, Ex. A-36.)

"Frank Duncan was barred yesterday from seeing his mother, Mrs. Elizabeth Duncan, now in county jail awaiting trial. . . .

"Duncan was visibly disappointed and angered by the refusal. He termed it 'extraordinary' and said it was 'uncalled for'. 'There is no justification for it,' he added. 'It smacks of the thumb and the screw—I mean, the rack and the screw.'

"Sullivan told newsmen that the bar to outside visitors would hamper preparation of his case. . . .

"He said he saw the 'handwriting' of District Attorney Roy A. Gustafson behind [Sheriff] Hill's orders yesterday. . . .

"[Duncan] said he had not read anything in any newspaper since last seeing his mother on December 20—six days before she was indicted in the slaying plot . . . to change his opinion of her innocence.

" 'Just because she is accused does not mean she is guilty,' he said. . . .

"Sullivan and Duncan also revealed yesterday that shortly after the 31-year old attorney was born, his mother was in a sanitarium."

(p. A-1 Ventura Star-Free Press, January 12, 1959, Sullivan, Ex. A p. 1.)

"Defense Counsel Sullivan reported he was somewhat startled, when going into the jail to visit his client, to hear the jailer call out the name of a prisoner. 'Gustafson,' the jailer called. 'Gustafson, come here.'

"Sullivan stopped and said: 'Would you mind telling me the first name of that fellow?'

"No, it wasn't Roy A."

(p. B-1 Ventura Star-Free Press, February 24, 1959, Ex. A-14.)

"Frank Duncan leveled this blast at Gustafson: 'There is no question but that he intends to climb to some higher political position over the body of my mother! Never, as a lawyer, did I think I would see such hatred, bias and prejudice in any court in the United States.'"

(p. A-6 Santa Barbara News Press, March 31, 1959, Ex. A-80.)

"Her son Frank . . . told the News Press this morning he is sure that the woman charged with killing his young wife is innocent.

"'After I read the complete Grand Jury transcript,' he said, 'I am fully convinced that my mother is innocent of the charge.' He also said he has 'the greatest concern' that she will not get a fair trial in Ven-

tura County, based on wide publicity given events which have gone before."

(p. A-1 Santa Barbara News Press, February 16, 1959, Ex. A-63.)

"District Attorney Roy Gustafson was accused of 'going a long way' to prejudice any jury that would hear the Duncan murder case.

"The accusation came from Mrs. Elizabeth Duncan's defense attorney, S. Ward Sullivan, who charged that Gustafson's public statements . . . using this case as an argument in favor of capital punishment are a very obvious effort to influence a verdict.

" 'His remarks,' Sullivan said, 'certainly will influen potential jurors in Ventura County. Gustafson is going a long way to see that these defendants do not receive a fair and impartial trial at the hands of an unbiased and unprejudiced jury.' "

(p. A-1 Ventura Star-Free Press, December 30, 1958, Ex. 8.)

"The following statement was handed to reporters by attorney Burt Henson this morning . . . 'One thing that troubles me about this case is the fact that the district attorney appears to be following a course of selective prosecution and selective retribution. It appears as though the district attorney is again deciding who is to be prosecuted and who shall be a target of retribution.' "

(p. A-1 Ventura Star-Free Press, January 29, 1959, Ex. A-4.)

"Mr. Sullivan told the Press Courier just before court convened today that the district attorney has been guil-

ty of prejudicial conduct 'in offering what he knew or should have known was incompetent and irrelevent [*sic*] evidence, entered for the purpose of degrading and debasing my client in the eyes of the jury.'"

(p. A-1 Oxnard Press Courier, March 9, 1959, Ex. A-86.)

"Sullivan who talked for two hours to Mrs. Elizabeth Ann Duncan, 54, today, said tonight:

"'I firmly belief that these two men maintained a bitter grudge toward the Duncan family and they resorted to murder in an attempt to blackmail this poor woman.'"

(p. 1 Los Angeles Times, December 23, 1958, Ex. 31.)

"Sullivan emerged from an hour and a half conference with Mrs. Duncan this afternoon to announce that he is convinced she is not guilty and that he will so plead her.

"He said he is convinced she had nothing to do with her daughter-in-law's disappearance and demise, but that he forsees [*sic*] a long trial, possibly two or three weeks."

(p. A-4 Los Angeles Herald Express, December 22, 1958, Ex. 10.)

"Duncan said . . . 'It's inconceivable that mother could associate with a man like that. It sounded like something that might be done in Chicago—not in Santa Barbara.

"'What a cold-blooded man (Moya). I'd like to lay my hands on that————————————.'"

(p. 1 Los Angeles Examiner, February 27, 1959, Ex. A-62.)

"Sullivan said it appeared to him that Gustafson had done 'a good job in educating the people of Ventura County on his views of capital punishment.'"

(p. A-1 Ventura Star-Free Press, February 18, 1959, Ex. A-40.)

"Said Sullivan: 'This is the clearest case of a miscarriage of justice that I have ever tried in my more than 30 years as a trial lawyer. There is more glaring error in this record than in any case I have ever tried.' . . .

"Of his client he said, 'I don't think she comprehends what happened. All she knows is that she was tried before a biased and prejudicial jury.'"

(p. A-1 Ventura Star-Free Press, March 21, 1959, Ex. A-36.)

"Frank Duncan said he had been reared very carefully by his mother, 'She taught me always to stick up for the under dog, not to hurt anyone, particularly the helpless. She was a very sensitive person—she couldn't stand to see a chicken killed,' he said."

(p. A-1 Ventura Star-Free Press, December 27, 1958, Ex. 5.)

"S. Sullivan, prominent Los Angeles attorney, disclosed that Mrs. Duncan's defense will probably be that she was being blackmailed by Baldonado and Moya."

(p. A-1 Oxnard Press Courier, December 23, 1958, Ex. 25.)

"S. Ward Sullivan, Mrs. Duncan's attorney, said he would 'just as soon' have both Baldonado and Moya plead guilty.

" 'We would prefer to go to trial without those two,' Sullivan said."

(p. A-1 Ventura Star-Free Press, January 29, 1959, Ex. A-4.)

"Frank Duncan had bitter comments after court about Moya's conversion. 'He claims to have religion now, yet he told about killing my wife with no more emotion than if he were ordering his lunch,' Frank said.

"He had said earlier it was inconceivable his mother could associate with a man like that."

(p. A-1 Ventura Star-Free Press, February 27, 1959, Ex. A-43.)

"Sullivan said he regards the Duncan case as one of the most interesting he has handled.

"He said his client has consistently stated to him that she is innocent. The main difficulty from a defense standpoint that he sees right now is in impaneling an impartial jury to try her.

"He feels statements by the District Attorney have seriously prejudiced the average Ventura County citizen against Mrs. Duncan."

(p. B-1 Ventura Star-Free Press, February 2, 1959, Ex. A-6.)

"Young Duncan greeted his mother again in the courtroom and took the opportunity to make several statements to the press. He said for one thing his mother, and other women prisoners in the county jail, are not allowed to read Ventura County newspapers on the belief they would obtain information concerning developments in cases in which they are involved.

"He also branded as 'hogwash' reports that his mother is accumulating a cache of sleeping pills and other drugs in her jail cell as a possible suicide preparation in case the murder trial goes against her."

(p. A-1 Ventura Star-Free Press, February 17, 1959, Ex. A-11.)

"Frank Duncan told reporters after the session that he did not learn of the phony annulment until many weeks after it was granted."

(p. A-16 Ventura Star-Free Press, February 26, 1959, Ex. A-16.)

"S. Ward Sullivan, veteran criminal lawyer, said today he will enter a plea of 'not guilty' for Mrs. Elizabeth Duncan . . . 'She denies having any part of the killing of Olga Duncan,' Sullivan said.

"He said she admitted having met both Augustine Baldonado and Luis Moya who are believed to have committed the actual killing. . . .

"Sullivan said that 'she feels someone else is trying to involve her in the murder.' . . .

"Asked what the feeling was between the two women, the son's wife and the mother-in-law, Sullivan said that there was no indication of hatred on the part of Mrs. Duncan. 'She has told me however, that there was no love lost between them."

(p. A-1 Ventura Star-Free Press, December 22, 1958, Ex. 3.)

"The Los Angeles attorney said there are a great number of facts in the matter which have not as yet been presented and which he feels will place a new light on the whole proceedings. . . .

"Sullivan said his client is maintaining a calm attitude outwardly but that she has obviously been hard-hit by the aspects of the charges against her. 'She has lost 12 pounds since being placed in custody.' Sullivan said. 'She would, of course, rather be spending her holiday season with her son and friends than in jail.' "

(p. A-1 Ventura Star-Free Press, December 24, 1958, Ex. 17.)

"Sullivan has told reporters one of his arguments will be that all of the testimony against Mrs. Duncan is from people who were admitted accomplices in the crime of murder, and that the law requires independent, corroborative evidence from people who were not directly involved."

(p. A-1 Ventura Star-Free Press, February 27, 1959, Ex. A-43.)

"Sullivan contends all who have testified to details of the alleged murder scheme up to now have branded themselves accomplices by their own testimony."

(p. A-1 Ventura Star-Free Press, March 3, 1959, Ex. A-46.)

"Earlier, Mrs. Duncan's attorney, S. Ward Sullivan, said he will demand a mistrial in the four-week-old trial, citing what he called 'misconduct of the district attorney.' . . . '[H]e knows the jury cannot exclude these matters from their minds,' Sullivan said."

(p. A-1 Ventura Star-Free Press, March 9, 1959, Ex. A-49.)

"Young Duncan refused to say what he thought about his mother's involvement. . . .

"'My mother would have to be insane to be linked into this . . .' he said."

(p. A-1 Oxnard Press Courier, December 26, 1958, Ex. 26.)

"Sullivan said later he had talked to her [Mrs. Duncan] about the verdict. . . .

"'She isn't surprised at the verdict,' he said, 'because she realizes she had to go to trial before a jury that was already biased and prejudiced, and she couldn't expect anything else from the outset of the trial.'"

(p. A-6 Santa Barbara News Press, March 21, 1959, Ex. A-80.)

"John Danch, Ventura attorney for Baldonado, said he expects the trial to take at least two weeks. He hopes the three defendants will be tried together, but anticipates Mrs. Elizabeth Duncan's attorney, S. Ward Sullivan, may seek a separate trial for his client.

"Danch says he feels it may be difficult to obtain an impartial jury in Ventura County."

(p. A-1 Ventura Star-Free Press, December 31, 1958, Ex. 19.)

"Sullivan said today Mrs. Duncan definitely will take the stand to testify in her own behalf, when the defense presents its case. Under the law, she cannot be required to do so."

(p. A-1 Ventura Star-Free Press, February 26, 1959, Ex. A-16.)

"Baldonado's attorney, John Danch, Ventura, said he plans to advise the former Camarillo resident against making any admissions in the Duncan trial starting today."

(p. A-2 Ventura Star-Free Press, February 16, 1959, Ex. A-9.)